Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

BARTHOLOMEW BANKS
RESPONDENT

ON CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

PETITION FOR A WRIT OF CERTIORARI

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

**TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals
1441 St. Antoine
Detroit, MI 48226
(313) 224-5792

**Counsel of Record

38 pp

QUESTION PRESENTED

UNDER SCOTT V UNITED STATES, 436 US 128, 138, 98 S Ct 1717, 56 L Ed 2d 168 (1978) WHERE, UNDER THE OBJECTIVE FACTS EXISTING AT THE TIME OF THE ARREST, THE SEIZURE OF THE PERSON OF AN INDIVIDUAL IS JUSTIFIABLE UNDER THE FOURTH AMENDMENT (HERE BECAUSE THERE WAS AN OUTSTANDING WARRANT FOR HIS ARREST), IS THAT DETENTION NONETHELESS CONSTITUTIONALLY UNJUSTIFIED, BRINGING INTO PLAY THE FOURTH AMENDMENT FRUIT OF THE POISONOUS TREE DOCTRINE AS TO A SUBSEQUENT VOLUNTARY CONFESSION AS WELL AS THE DISCOVERY OF PHYSICAL EVIDENCE, IF THOSE EXISTING OBJECTIVE FACTS JUSTIFYING IT ARE NOT KNOWN TO THE ARRESTING OFFICERS AT THE TIME OF THE ARREST, AND THE FACTS WHICH ARE WITHIN THE KNOWLEDGE OF THE ARRESTING OFFICERS ARE INSUFFICIENT TO DEMONSTRATE PROBABLE CAUSE FOR THE OFFENSE ON WHICH THEY ARRESTED?

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THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

BARTHOLOMEW BANKS
RESPONDENT

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of Research, Training and Appeals, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, issued September 12, 1994, leave denied by the Michigan Supreme on January 24, 1995, two justices dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported, and is appended as Appendix A. The order of the Michigan Supreme Court is unreported at this time and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on September 12, 1994. The Michigan Supreme Court denied discretionary appeal, with two justices dissenting from the denial, on January 24, 1995. The jurisdiction of this Court is invoked under 28 USC (1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the People to be secure in their persons, houses, papers, and effects, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent was convicted of first degree murder, two counts of assault with intent to murder, and possession of a firearm in the commission of a felony. He received a sentence of life imprisonment for the murder conviction, 15-25 years for each of the assault offenses, and two years for the felony firearm offense.

Respondent was arrested without a warrant at approximately 11:15 am on April 11, 1989. He made a statement at approximately 7:20 pm, and took the police to the gun that had been used in the murder (a "drive by" shooting). When he returned to the police station he gave a further statement at approximately 10:20 pm.

The codefendant was confronted with the weapon to which respondent had led the police and gave a statement implicating respondent in the crime. On the basis of

this statement the police again informed respondent of his rights under Miranda, and questioned him further at approximately 2:00 am on April 12, 1989, informing him of his codefendant's statement that respondent had fired shots at the vehicle in which the deceased was killed. Respondent admitted it.

Respondent moved to suppress his confession on Fourth Amendment grounds, arguing that his arrest was without probable cause. The trial court agreed that the arrest was without probable cause; however, because there had been a valid outstanding warrant for respondent's arrest for probation violation the trial court held that the detention of the respondent was lawful nonetheless. The trial court relied on an unpublished Michigan opinion which quoted from this Court's opinion in Scott v United States, 436 US 128, 138, 98 S Ct 1717, 56 L Ed 2d 168 (1978) that "The

fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."

The Michigan Court of Appeals disagreed and reversed. That court held that Scott applies only to "situations where the police may lack an awareness of the legal justification for an action they have taken but the facts known to the police at the time of the action support the justification. In other words, the legal justification for a warrantless arrest should be based on facts known to the police at the time of the arrest" (slip opinion, at 2, emphasis supplied). The court thus held that respondent's confession, as well as the gun to which he led the police, were improperly admitted,

causing reversal of the conviction, and the suppression of the confession and gun on any retrial.

Respondent sought leave to appeal from the Michigan Supreme Court, which was denied on January 24, 1995, with two justices dissenting.

REASONS FOR GRANTING THE WRIT

In Scott v United States, 436 US 128, 138, 98 S Ct 1717, 56 L Ed 2d 168 (1978) this Court held that "The fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." 56 L Ed 2d at 178. In dicta, the Court also said observed that "almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." 56 L Ed 2d at 177.

This statement has, petitioner submits, led some courts, including the Michigan Court of Appeals in this case, as

well as come commentators, into believing that just as there is, in some circumstances, a "good faith" exception to application of an exclusionary sanction when there has been a Fourth Amendment violation, there is also a "bad faith" rule which requires application of an exclusionary sanction for "bad motives" or "subjectively unjustified actions" of the police <u>even where the Fourth Amendment has not been violated</u>. This confuses that which is necessary to justify an exclusionary remedy once a constitutional violation has been established, and that which is necessary to demonstrate a <u>constitutional violation has occurred</u>. Difficult societal policy decisions related to the exclusion of reliable and probative evidence from a trial, the purpose of which is to find the truth, particularly where that which has occurred is a wrong done to the citizens of the State through criminal

conduct (and here, the ultimate wrong, the taking of a life), for the purpose of deterring police conduct which is determined to be improper under the constitution, simply have no place where no constitutional violation has occurred, even if none has occurred for reasons unknown to the arresting officers. If society wishes to punish officers for actions which are objectively justifiable, because the grounds employed by the officers are not justifiable, it is the political branches of government which must make that decision.

The opinion of the Michigan Court of Appeals here squarely presents the issue. The court held that Scott applies only to "situations where the police may lack an awareness of the legal justification for an action they have taken but the facts known to the police at the time of the action support the justification. In other words,

the legal justification for a warrantless arrest should be based on facts known to the police at the time of the arrest" (slip opinion, at 2). Petitioner submits that as a matter of determining whether a constitutional violation has occurred, the circumstance where the legal justification for the official action is unknown to the officers, though the objective facts actually justify that action for a different reason than subjectively understood by the officers, is no different than the circumstance where the objective facts actually justify the officers action, though those facts are unknown to the officers at the time of the action. In effect, if the individual arrested is lawfully in custody, for any reason, he has no standing to attempt to punish the officers, or to deter their future conduct, by suppressing evidence in his criminal

case, for, objectively viewed, his custody was proper.

Compare several circumstances:

1)The situation exemplified by Scott itself, where under the objective facts known to the officers, there is a legal ground for their actions, but that same action is taken by officers offering a different justification for their actions; a different example from Scott might be where officers indicate they searched the passenger compartment of an automobile after the arrest of the defendant pursuant to an inventory when in fact the department had no inventory policy, but the search was completely proper as incident arrest under Belton v New York, 453 US 454, 69 L Ed 2d 768, 101 S Ct 2860 (1981).

2)The situation where the police have made a subjective determination to act in a manner which would be viewed as improper but before that action is taken facts

supporting the planned conduct arise; for example, if the police, observing a traffic violation, intend not only to stop the vehicle, but to search the passenger compartment, but upon approaching the vehicle see a gun on the floor of the vehicle and arrest the driver, then searching the vehicle incident the arrest.

3)The situation where an officer takes action based on facts known to him, subjectively believing that the facts do not support that action, when in fact, the facts <u>do</u> justify the action; for example, if an officer were to receive information from an informant and arrest an individual, subject believing that the information was insufficient for probable cause when in fact it was sufficient.

4)The situation where the police take action which is, objectively viewed, completely justified, but the police have a subjective hope or desire that their

actions might lead to the discovery of something else, perhaps more serious, and without that subjective desire they might not have undertaken the objectively proper action; for example, where the police observe a traffic violation and stop the vehicle for the infraction, subjectively hoping that drugs or other contraband might be observed when the vehicle is stopped, and without which hope they would not have made the stop, and such contraband <u>is</u> in fact found without any improper action by the police.

5) The situation involved in the instant case, where the police believe they are acting appropriately, but the legal theory upon which they act is unsupported by the facts known to them, though their actions are justified by facts <u>unknown</u> to them but <u>in existence</u> at the time of those actions.

In the first of these situations, Scott teaches that no constitutional violation has occurred, despite what some might term the "blameworthy" state of mind of the officers in acting for a reason which is not justified by the facts known to them. In the second of these situations, Scott would again lead to the conclusion that no constitutional violation has occurred, despite what some might term the "blameworthy" state of mind of the officers for being prepared to act in an improper manner, that impropriety being fortuitously avoided by events. In the third of these situations, Scott teaches that no constitutional violation has occurred, despite an admittedly blameworthy state of mind of the officer for acting despite the fact that he or she believed the actions were not justified (though in fact, on the facts known the officer they were). In the fourth of these situations,

Scott teaches that the action is justifiable, and amicus would submit that there is not even a blameworthy state of mind in this situation (but which is nonetheless not without current controversy. See United States v Ferguson, 8 F3d 385 (CA 6 en banc, 1993), cert den 115 S Ct 97 (1994)). What, then of the fifth situation?

Petitioner submits that the state of mind of police officers in the fifth situation, that of the instant case, is no more "blameworthy" than in the other scenarios presented where evidence is not excluded. More importantly, that "blameworthiness" is no more relevant to whether the individual whose liberty has been restrained is restrained in violation of the Fourth Amendment or not.

Here, had the officers known of the probation violation warrant, there is no question that the arrest of the respondent

would have been proper, as would his interrogation with regard to the murder, and the taking of a "Miranda proper" and voluntary confession, as well as respondent's voluntary act of taking the police to the murder weapon. Indeed, if the police had learned of the existence of the warrant at any time prior to these voluntary acts of the respondent there is no question but that the evidence would be admissible. That the objective fact that the respondent was the subject of a warrant for his apprehension, executed by a judicial officer, so that his restraint was proper by any officer encountering him, was not known to the officers who acted in restraining his liberty does not change the fact that his liberty was rightfully restrained, even if for the wrong reason. Again, if society wishes to "punish" the police for taking appropriate action based on facts not known to them at the time but

in existence at the time, by excluding evidence in a murder case, this is a decision for the political branches of government, which might determine either that no sanction is necessary or appropriate, or that some sanction which does not also cause gratuitous harm to the public interest should be imposed.

The issue here is of significance, not only to the State of Michigan regarding the murder here to which the respondent voluntarily confessed, and voluntarily took the police to the murder weapon, but to the jurisprudence of the country. Scott has been taken by other courts, and by commentators, to mean that there are circumstances when the "bad faith" of the police may be punished though the liberty of the individual seeking the sanction of exclusion of evidence was rightfully restrained when all of the facts, including those unknown to the officers, are viwed in

an objective manner, those decisions and those commentators confusing the rationale for exclusion when a constitutional violation has been found and determining when a constitutional violation has in fact occurred. See e.g. State v Hollis, 633 A2d 13262 (Vermont, 1993); United States v Rambo, 789 F2d 1289 (CA 8, 1986); State v Martin, 440 NW2d 676 (1989) (confusing justification of actions with events which occur after that action with justification of actions with facts in existence at the time of the action, but unknown to the officers, the court holding that an arrest for one ground for which there was not probable cause could not be justified on the basis of the fact that there was an outstanding arrest warrant for the defendant because an "arrest which occurs without probable cause cannot be made lawful by events which occur afterward" (emphasis added)). See also 1 LaFave,

Search and Seizure sec. 1.4 (1995 pocket part, fn 25): "the new theory must be based on facts known by the officer at the time of the arrest."

Respondent here had no "objective" right to be free; there was in existence a proper warrant for his arrest. He <u>was</u> arrested. That he was arrested on a ground later determined unsupported by facts known to the officers who arrested on that ground does not alter the fact that his liberty was, on the basis of all the facts when objectively viewed, lawfully restrained. Because no constitutional violation occurred here, no consideration of the application of any sanction to the police on the basis of "bad faith" (though their actions can scarcely be described as in bad faith here) is appropriate, except as the political branches of government may wish to consider the question. The Michigan Court of Appeals, and other jurisdictions

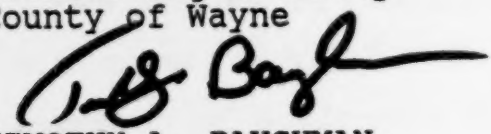
as well as commentators, have misconstrued this Court's decision in Scott, and an important issue to the constitutional jurisprudence of the Nation is presented which requires the plenary review of this Court.

CONCLUSION

WHEREFORE, Petitioner respectfully submits that plenary review is warranted, and requests that certiorari be granted.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne



TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

APPENDIX A: COURT OF APPEALS OPINION

PEOPLE V BARTHOLOMEW BANKS
DOCKET NO. 127196. UNPUBLISHED

SEPTEMBER 12, 1994

Before: MURPHY, P.J., and Marilyn Kelly and W.C. Buhl, JJ.

PER CURIUM

A jury convicted defendant of first-degree murder, MCL 750.316; MSA 28.548, two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm when committing a felony, MCL 750.227b; MSA 28.424(2). Codefendant Donnell Banks was tried before a separate jury. The trial court sentenced defendant to mandatory life imprisonment for the first-degree murder offense, fifteen to twenty-five years for each of the assault offenses, and two years for the felony-firearm offense. Defendant appeals as of right from his conviction. We reverse.

APPENDIX A: COURT OF APPEALS OPINION

Defendant argues that the trial court erred in denying defendant's pretrial motion to suppress his confession obtained through custodial interrogation after a warrantless arrest. Testimony about the circumstances surrounding the arrest and confession was presented at an evidentiary hearing.

This case arose from the drive-by shooting of a vehicle with three people in it including Ervin Wilson, who was killed by the shooting. The shooting occurred around 9:00 pm on April 10, 1989. The police learned that the shooting was intended for Maurice Williams. Williams told the police that he had trouble with Darrell Banks and his brother Donnell Banks the day before the shooting. The police believed that the shooting was in retaliation for a prior incident that resulted in Darrell Banks being shot. On the basis of Williams' statement and other

information, the police believed that they had probable cause to arrest Donnell Banks. Defendant was the uncle of both Darrell and Donnell Banks.

The next morning on April 11, 1989, the police were investigating the area where Darrell had been shot when they observed Donnell driving pass (sic) in a vehicle with defendant and another man. The police followed the vehicle and arrested Donnell and defendant without a warrant around 11:15 am.

Around 7:20 pm, the police advised defendant of his constitutional rights and questioned him about the shooting of the vehicle that resulted in the death of Ervin Wilson. Defendant gave a statement in which he admitted to shooting at a crack house the night before in retaliation for the shooting of Darrell, but defendant did not indicate that he had shot after a vehicle. After defendant gave this

statement, defendant led the police to the gun that he had used. When they returned to the office with the gun, defendant made an additional statement at 10:20 pm about how he learned that Darrell had been shot.

Around 9:00 pm, the police began to take a statement from codefendant Donnell Banks. During the interrogation of Donnell, the police showed him the weapon confiscated from defendant and asked Donnell to identify it. Donnell gave a statement that implicated defendant in the shooting of the vehicle. On the basis of Donnell's statement, the police again notified defendant of his constitutional rights and again questioned him about the shooting. This question of defendant occurred around 2:00 am on April 12, 1989. The police informed defendant that Donnell had given a statement that implicated defendant in the shooting of the vehicle. Defendant had been in police custody since

his arrest. At this time, defendant confessed to shooting the vehicle.

Defendant moved to suppress his confession on the ground that his arrest was illegal and, therefore, the resulting confession was inadmissible. The trial court found that the police did not have probable cause to arrest defendant on the basis of the information that they had at the time. However, the trial court ruled that the confession should not be suppressed because there had been a valid outstanding warrant for defendant's arrest involving a probation violation that would have given the police sufficient cause to make the arrest. Further, the trial court determined that the intervening circumstances repaired the illegal arrest. See Taylor v Alabama, 457 US 687, 690-693; 102 S Ct 2664; 73 L Ed 2d 314 (1982).

To support the ruling that the outstanding arrest warrant justified the

warrantless arrest, the trial court relied on an unpublished opinion from this Court. An unpublished opinion does not have the effect of binding precedent. MCR 7.215(C)(1). In this unpublished opinion, the defendant argued that her statements should have been suppressed as the fruit of an improper, warrantless arrest in her home. This Court found that the arrest was justified because there had been an outstanding bench warrant against the defendant. The fact that the officer did not subjectively have in mind the bench warrant did not make the arrest less justified. This holding was based on the following quote from People v Arterberry, 431 Mich 381, 384; 429 NW2d 574 (1988)(quoting Scott v United States, 436 US 128, 138; 98 S Ct 1717; 56 L Ed 2d 168 (1978)):

> (T)he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.

We believe that the proposition quoted above applies to situations where the police may lack an awareness of the legal justification for an action they have taken but the facts known to the police at the time of the action support the justification. In other words, the legal justification for a warrantless arrest should be based on facts known to the police at the time of the arrest. See Scott, Supra, 137-138 (holding that a Fourth Amendment challenge requires assessment of a search or seizure under the objective standard of reasonableness, which is based on facts available to the officer at the moment of the search or seizure);

APPENDIX A: COURT OF APPEALS OPINION

People v Westra, __Mich__; __NW2d__ (Docket No. 98725, decided June 7, 1994)(agreeing that the constitutional of police conduct must be judged in light of the information available to them at they time they acted); People v Oliver, 417 Mich 366, 374; 338 NW2d 167 (1983)(holding that in reviewing a claim that a police officer lacked probable cause to arrest, the case must be analyzed in light of the facts confronting the officer at the moment of arrest). Also see MCL 764.15(1)(e; MSA 28.874(1)(e), which authorizes a warrantless when the peace officer has received information that another peace officer holds a warrant for the arrest.

In this case the police lacked probable cause to arrest defendant without a warrant. Further, the police arrested defendant apparently without being informed of the outstanding bench warrant. The arrest cannot be justified by this warrant

because it was unknown to the police at the time of the arrest. In addition, we do not see how the intervening events broke the causal connection between the illegal arrest and the confession. Although the intervening events increased the evidence in front of the police, these events did not contribute to defendant's ability to consider carefully and objectively his options to exercise his free will. See Taylor, supra, at 691. Therefore, the confession was the fruit of a poisonous tree.

We conclude that the trial court clearly erred in denying defendant's motion to suppress the confession. After reviewing the record, we cannot say that the admission of the confession at the trial was harmless. Accordingly, we find this error warrants reversal of defendant's convictions.

While our determination of the above

issue disposes of this case, we briefly will address defendant's argument that the examining magistrate abused his discretion in binding defendant over for first-degree murder and assault to commit murder. This issue may be relevant in the event defendant is retried. We reviewed the preliminary examination transcript and determine that the magistrate committed no abuse of discretion in finding probable cause to believe that defendant committed the offenses charged. See People v McBride, __Mich App__; __NW2d__ (Docket No. 151898, decided May 2, 1994, 9:00 am). It is not necessary to discuss the other issues raised by defendant on appeal.

Defendant's convictions and sentences are reversed and the matter is remanded to the trial court for further proceedings

consistent with this opinion.

Reversed and remanded.

William B. Murphy
William C. Buhl

I concur in result only.
Marilyn Kelly

APPENDIX B:
ORDER OF MICHIGAN SUPREME COURT

ORDER
Entered: January 24, 1995

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,
Cross-Appellee.

v

SC: 101103
COA: 127196
BARTHOLOMEW BANKS LC: 89-4867
Defendant-Appellee
Cross-Appellant.

On order of the Court the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. The application for leave to appeal as cross-appellant, the motion for stay, and the motion to strike are DENIED as moot.

Brickley, C.J., and Weaver, J., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 24, 1995 /s/Corbin R. Davis
Clerk